A

BADRUL ZAMAN PS MD ZAKARIAH

v.

MOHD ARIS CHONIN & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5 (S2) 21-136-2000]
1 AUGUST 2006

C ***CIVIL PROCEDURE:*** *Costs - Security for costs - Application for - Whether there was reason to believe plaintiff unable to pay costs - Plaintiff's address showed a dormant company with no income - Whether defendants has legitimate right to file application - Whether plaintiff's action constituted mala fide - Whether defendants prejudiced - Whether*
D *security for costs in favour of defendants*

This was the defendants' application in encl. 50 by way of a summons in chambers for security for costs against the plaintiff pursuant to O. 23 of the Rules of the High Court 1980 ('RHC') and pursuant to s. 351 of the Companies Act 1965. The facts
E were that the first defendant (an immigration officer) had arrested the plaintiff who was then charged under s. 12(1)(f) of the Passport Act 1966 punishable under s. 12(2) of the same Act. Eventually, the plaintiff was acquitted and discharged. The plaintiff
F thus filed a civil suit against the government officers and the government of Malaysia. The defendants herein submitted that a search had been conducted with the registrar of companies and it was discovered that the address provided by the plaintiff was the registered address of a dormant company without any source of
G income. For this reason, the defendants urged this court to order the plaintiff to deposit RM50,000 into this court as security for costs. It was further averred that in the event this court ordered the plaintiff to pay costs to the defendants, the plaintiff may not be able to comply with the said order because the plaintiff had no
H source of income and thus, the defendants' application for security for costs should be acceded to by this court. The plaintiff, however, submitted that there were no provisions in the law nor in the rules to allow the defendants' application for security for costs and prayed that the defendants' application be dismissed.

I

Held (application in encl. 50 in favour of defendants):

(1) The plaintiff was wrong when he submitted that there were no provisions in the law governing an application by the defendants in encl. 50 for security for costs. On the contrary, O. 23 of the RHC and s. 351 of the Companies Act 1965 would certainly be the guidelines in adjudicating encl. 50. (para 18)

(2) It was just to order security for costs in favour of the defendants because (i) there was reason to believe that the plaintiff would not be able to pay the defendants' costs when directed by this court in the event the plaintiff's case was dismissed; (ii) the address of the plaintiff in his writ of summons and the amended statement of claim showed the address of a dormant company with no source of income and (iii) consequently, the plaintiff himself had no source of income to flout around. (para 18)

(3) There was no delay on the part of the defendants in pursuing encl. 50. When the plaintiff filed the present suit against the defendants, the original statement of claim was amended and even the original statement of defence was amended. After the pleadings were amended, the defendants discovered that the plaintiff had no source of income. This prompted the defendants to file the application for security for costs in encl. 50. The defendants had the legitimate right to file encl. 50. (para 19)

(4) Whether the plaintiff had reasonably good prospects of success or whether the application for security for costs was being used oppressively by the defendants must be weighed as against the argument that the plaintiff had no genuine claim at all against the defendants. Including the present suit, there were, in all, twelve civil suits against the government of Malaysia that were pending. The immigration officers had arrested the plaintiff and had charged him and that became the main basis for all the plaintiff's twelve suits. Even the newspapers that carried the stories of the arrests of the plaintiff and the television station were being sued by the plaintiff. The public prosecutor, the director general of immigration and other top civil servants were named as defendants. The plaintiff's action could not be construed as *bona fide* but rather it smacked of bad faith or *mala fide*. (para 21)

(5) If the plaintiff were to lose his case and this court awarded costs to the defendants, the defendants would find it difficult to enforce the award for costs given the fact that the address of the plaintiff that was given was not his place of residence but rather the registered office of his company. The plaintiff, by using the company's address as his own, had by that very act, prejudiced the defendants in that the plaintiff intended to evade the consequences of the litigation. The defendants were entitled to file the application in encl. 50 for security for costs. (para 22)

[The plaintiff to pay security for costs in favour of the defendants; the whole of plaintiff's suit against defendants be struck out with costs in the event plaintiff failed to abide by order of this court.]

Case(s) referred to:

Aron Salomon v. A Salomon And Company Limited [1897] AC 22 HL ***(refd)***

Bacal Contracting Ltd v. Modern Engineering (Bristol) Ltd [1980] 2 All ER 655 ***(refd)***

Brocklebank & Co v. King's Lynn SS Co [1878] 3 CPD 365 ***(refd)***

Coldham v. The Raub Australian Gold Mining Co Ltd [1940] MLJ 50 ***(refd)***

Cripps v. Heritage Distribution Corpn, New England International Surety Inc v. Cripps [1999] CPLR 858 ***(refd)***

Dallison v. Caffery [1965] 1 QB 348 ***(refd)***

Dominion Brewery Ltd v. Foster [1897] 77 LT ***(refd)***

El Guzouli-Daf v. Commissioner of Police for the Metropolis [1995] QB 335 ***(refd)***

Farmer v. Moseley (Holdings) Ltd [2001] All ER (D) 16 ***(refd)***

Faridah Begum Abdullah v. Dato' Michael Chong [1995] 2 CLJ 951 HC ***(refd)***

Giddings v. Giddings [1847] 10 Beav 29 ***(refd)***

Gnanamuthu v. Muthu Chetty [1926] 6 FMSLR 73 ***(refd)***

Gordano Building Contractors Ltd v. Burgess [1988] 1 WLR 890 ***(refd)***

Gula Perak Bhd v. Agri-Projects (M) Sdn Bhd [1989] 1 MLJ 422 ***(refd)***

Hicks v. Faulkner [1878] 8 QBD 167 ***(refd)***

Ho Kwai Neo (widow) & Anor v. Tan Kim Tee and Tan Kiem Tie Ltd [1940] MLJ 84 ***(refd)***

Imperial Bank of China, India and Japan v. Bank of Hindustan, China and Japan [1866] 1 Ch App 437 ***(refd)***

Kasturi Palm Products v. Palmex Industries Sdn Bhd [1986] 2 MLJ 310 ***(refd)***

La Grange v. McAndrew [1879] 4 QBD 210 ***(refd)***

Long Samat & Ors v. PP [1974] 2 MLJ 152 ***(refd)***

Low Chee Yan v. Loh Kong Yew [1917] 2 FMSLR 176 ***(refd)***
Massey v. Allen [1879] 12 Ch D 807 ***(refd)***
Penny v. Penny [1996] 2 All ER 329 ***(refd)***
Porzelack K G v. Porzelack (UK) Ltd [1987] 1 All ER 1074 ***(refd)***
Procon (GB) Ltd v. Provincial Building Co Ltd [1984] 2 All ER 368 ***(refd)***
Raman Chettiar v. Palaniappa Chettiar & Anor [1939] MLJ 165 ***(refd)***
Re Hurter's Trade-Mark [1887] WN 71 ***(refd)***
S v. S Muthuraman Chettiar, Etc v. E Kong Guan [1934] MLJ 174 ***(refd)***
Selco (Singapore) Ltd v. Jean Del-porte [1969] 2 MLJ 189 ***(refd)***
Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd [1973] 1 QB 609 ***(refd)***
Speed Up Holdings Ltd v. Gough & Co (Hardly) Ltd [1986] FSR 330 ***(refd)***
Willmott v. Freehold House Property Co [1885] 33 WR 554 ***(refd)***

Legislation referred to:
Arbitration Act 1965, s. 29
Companies Act 1965, s. 351(1)
Federal Constitution, art. 145(3)
Passport Act 1966, s. 12(1)(f), (2)
Rules of the High Court 1980, O. 23 r. 1(1)

Companies Act 1948 [UK], s. 447

Other source(s) referred to:
Shanthy Rachagan, Janine Pascoe & Anil Joshi, *Principles of Company Law in Malaysia,* p 558

For the plaintiff - Manoharan Malayalam; M/s M Manoharan & Co
For the defendants - Kamaludin Md Said SFC

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Malik Ishak J:

Security For Costs

[1] This was the defendants' application in encl. 50 by way of a summons in chambers for security for costs against the plaintiff pursuant to O. 23 of the Rules of the High Court 1980 ("RHC") and pursuant to s. 351 of the Companies Act 1965. Enclosure 50 was heard in chambers by this court in the presence of Mr. Manoharan Malayalam who acted for the plaintiff and all the four defendants were represented by the learned Senior Federal

Counsel in the person of Mr. Kamaludin bin Md. Said. The plaintiff was not present physically before this court in chambers and neither were the four defendants.

[2] In encl. 50, the four defendants sought for the following orders (in its original text):

(i) bahawa plaintif memberi jaminan untuk kos kepada defendan-defendan dalam tindakan ini sebanyak RM50,000.00 atau apa-apa jumlah memuaskan hati Mahkamah yang mulia ini;

(ii) bahawa plaintif membayar ke dalam Mahkamah jaminan untuk kos sebagaimana yang diperintahkan oleh Mahkamah dalam tempoh 30 hari dari perintah Mahkamah mengarahkan plaintif berbuat demikian;

(iii) bahawa keseluruhan tindakan plaintif ini dibatalkan dengan kos sekiranya plaintif ingkar dengan perintah supaya membayar jaminan untuk kos apabila diperintahkan oleh Mahkamah berbuat demikian;

(iv) bahawa apa-apa perintah lain yang difikirkan adil oleh Mahkamah yang mulia ini; dan

(v) bahawa kos permohonan ini ditanggong oleh plaintif.

[3] What the four defendants sought in encl. 50 was for the plaintiff to pay the sum of RM50,000 as security for costs to be paid to this court within 30 days from the date of the order of this court failing which this court may strike out the whole of the plaintiff's suit and this court too may make any other orders as this court thinks fit to order and further that the costs of this application to be borne by the plaintiff.

Facts Of The Case

[4] For this exercise, I must refer to the affidavit in support as seen in encl. 50A that was affirmed by the learned Senior Federal Counsel himself on 7 June 2005. That affidavit in support annexed as an exhibit the amended statement of claim of the plaintiff marked as exh. "KMS1". In the amended statement of claim of the plaintiff, the following facts materialised. That on 23 February 1998 at about 10.30am acting on Dang Wangi police report number 3952/98, the first defendant – an immigration officer, together with several other immigration officers entered into the plaintiff's premises known as "Agensi Pekerjaan Dan Levi Al Zaman Sdn Bhd" located at Nos: 90 and 92, Tingkat 3, Jalan

Pahang, Kuala Lumpur and arrested the plaintiff. On 28 February 1998, the plaintiff was charged in the Magistrate's Court under s. 12(1)(f) of the Passport Act 1966 punishable under s. 12(2) of the same Act. Eventually the plaintiff was tried before the Magistrate's Court and, on 6 April 1998, the learned Magistrate at the close of the prosecution's case acquitted and discharged the plaintiff without calling him for his defence. The Attorney-General filed an appeal to the High Court against the order of acquittal and discharge as ordered by the learned Magistrate. On 25 January 2000, the Attorney-General withdrew the said appeal. No one can challenge the decision of the Attorney-General in so far as criminal prosecutions are concerned. In *Long bin Samat & Ors. v. Public Prosecutor* [1974] 2 MLJ 152, FC, Suffian LP after referring to art. 145, cl. 3 of the Federal Constitution aptly said at p. 158 of the report:

> In our view, this clause from the supreme law clearly gives the Attorney-General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue. (For the position in England, please see Viscount Dilhorne's speech at pages 32-3 in *Smedleys Ltd. v. Breed* [1974] 2 All ER 21). Still less then would the court have power to compel him to enhance a charge when he is content to go on with a charge of a less serious nature.
>
> Anyone who is dissatisfied with the Attorney-General's decision not to prosecute, or not to go on with a prosecution or his decision to prefer a charge for a less serious offence when there is evidence of a more serious offence which should be tried in a higher court, should seek his remedy elsewhere, but not in the courts.

Incidentally, in this civil suit, the Public Prosecutor who happens to be the Attorney-General is cited as the second defendant, while the Director-General of Immigration is cited as the third defendant and the Government of Malaysia is cited as the fourth defendant. In short, the plaintiff filed this civil suit against government officers and the Government of Malaysia. The Attorney-General as the Public Prosecutor takes charge of all the criminal prosecutions in the country. It is very difficult, in fact, impossible to prove want

of reasonable and probable cause on the part of the prosecution to prosecute a particular case. According to Diplock LJ (as he then was) in *Dallison v. Caffery* [1965] 1 QB 348, at p. 371:

> The test whether there was reasonable and probable cause for the arrest or prosecution is an objective one, namely, whether a reasonable man, assumed to know the law and possessed of the information which in fact was possessed by the defendant, would believe that there was reasonable and probable cause. Where that test is satisfied, and onus lies on the person who has been arrested or prosecuted to establish that his arrestor or prosecutor did not in fact believe what ex hypothesi he would have believed had he been reasonable (see *Herniman v. Smith* [1938] AC 305, 316, [1938] 1 All ER 1, HL (E), per Lord Atkin). In the nature of things this issue can seldom seriously arise.

Again at p. 376 of the same report of the same case, Diplock LJ (as he then was) said:

> But it is not the prosecutor's duty to resolve a conflict of evidence from apparently credible sources: that is the function of the jury at the trial. The prosecutor's knowledge that there is such a conflict does not of itself constitute lack of reasonable and probable cause for the prosecution, nor is it inconsistent with the prosecutor's honest belief that there is a case against the accused fit to go to a jury.

The Court of Appeal in *El Guzouli-Daf v. Commissioner of Police for the Metropolis* [1995] QB 335, [1995] 1 All ER 833 held that the Crown Prosecution Service owes no general duty of care in relation to the conduct of a prosecution. Perhaps it is not out of place to refer to the case of *Hicks v. Faulkner* [1878] 8 QBD 167 at p. 173. There, Hawkins J had this to say:

> The question of reasonable and probable cause depends in all cases, not upon the actual existence, but upon the reasonable bona fide belief in the existence of such a state of things as would amount to a justification of the course pursued in making the accusation complained of – no matter whether this belief arises out of the recollection and memory of the accuser, or out of information furnished to him by another. It is not essential in any case that facts should be established proper and fit and admissible as evidence to be submitted to the jury upon an issue as to the actual guilt of the accused. The distinction between facts to establish guilt and those required to establish a bona fide belief in guilt should never be lost sight of in considering such cases as that I am now discussing. Many facts admissible to prove the latter would be wholly inadmissible to prove the former.

[5] Reverting back to the narration of the facts, I must now make reference to the amended statement of defence of the four defendants that was annexed to the affidavit in support in encl. 50A and it was marked as exh. "KMS2". In the amended statement of defence, the defendants admitted arresting the plaintiff based on the said Dang Wangi police report number and that the first defendant had sized 350 Indian National passports that were held by the plaintiff. The defendants too admitted that the plaintiff was charged in the Magistrate's court under s. 12(1)(f) of the Passport Act 1966 for possession of those passports without lawful authority which was punishable under s. 12(2) of the same Act. In their defence, the defendants had averred that the arrest and detention of the plaintiff including the investigation, charge and prosecution that followed thereto were all based on reasonable and probable cause and were done in accordance with the relevant procedure and the law thereto. Of pertinence would be this. That the amended statement of defence in no uncertain terms vigorously denied that the first defendant had demanded from the plaintiff the sum of RM50,000 for not arresting the plaintiff. It was the defence of the defendants that there was no solicitation of corrupt money by the first defendant and that it was concocted by the plaintiff solely to discredit the good name of the first defendant and to lower the image and reputation of the third defendant. The first defendant has since lodged a police report at the Travers police station pertaining to the false allegation by the plaintiff *vide* Travers report no: 747/98.

[6] It was averred in the affidavit in support in encl. 50A that the plaintiff's address was listed as at numbers 90 & 92, 3rd floor, Jalan Pahang 53000 Kuala Lumpur which was the registered address of a company known as "Syarikat Agensi Pekerjaan dan Levi Al-Zaman Sdn Bhd". The defendants conducted a search with the Registrar of Companies and discovered that the address provided by the plaintiff was the registered address of a dormant company without any source of income. The plaintiff owned that dormant company and this meant that the plaintiff had no source of income. It was for this reason that the defendants urged this court to order the plaintiff to deposit RM50,000 into this court as security for costs. The plaintiff had also filed several other civil suits against the Government of Malaysia based on the same set of facts like the present case at hand. For brevity, I shall now itemise these other civil suits:

(a) Mahkamah Tinggi Kuala Lumpur, No: S2-21-20-2001

Badrul Zaman P.S. Md. Zakariah

v.

(1) Utusan Melayu (M) Bhd

(2) Datuk Aseh Che Mat

(3) Kerajaan Malaysia

(b) Mahkamah Tinggi Kuala Lumpur, No: S2-21-01-2001

Badrul Zaman P.S. Md. Zakariah

v.

(1) Jabatan Penyiaran Radio & TV

(2) Datuk Aseh Che Mat

(3) Kerajaan Malaysia

(4) Sistem Televisyen Malaysia Berhad

(c) Mahkamah Tinggi Kuala Lumpur, No: S2-21-70-2000

(1) Badrul Zaman P.S. Md Zakariah

(2) Agensi Pekerjaan Dan Levi Al-Zaman Sdn Bhd

v.

(1) Aseh Che Mat

(2) Kerajaan Malaysia

(3) Utusan Melayu (M) Bhd

(d) Mahkamah Tinggi Kuala Lumpur, No: S3-21-26-2001

Badrul Zaman P.S. Md Zakariah

v.

(1) Pemandangan Sinar Sdn Bhd

(2) Datuk Aseh Che Mat

(3) Kerajaan Malaysia

(e) Mahkamah Tinggi Kuala Lumpur, No: S5-21-21-2001

Badrul Zaman P.S. Md Zakariah

v.

(1) Nanyang Siang Pao Sdn Bhd

(2) Datuk Aseh Che Mat

(3) Kerajaan Malaysia

(f) Mahkamah Tinggi Kuala Lumpur, No: S6-21-22-2001

Badrul Zaman P.S. Md Zakariah

v.

(1) The China Press Bhd

(2) Datuk Aseh Che Mat

(3) Kerajaan Malaysia

(g) Mahkamah Tinggi Kuala Lumpur, No: S7-21-23-2001

Badrul Zaman P.S. Md Zakariah

v.

(1) Tamil Nesan (M) Sdn Bhd

(2) Datuk Aseh Che Mat

(3) Kerajaan Malaysia

(h) Mahkamah Tinggi Kuala Lumpur, No: S7-21-27-2001

Badrul Zaman P.S. Md Zakariah

v.

(1) Penerbitan Sahabat (M) Sdn Bhd.

(2) Datuk Aseh Che Mat

(3) Kerajaan Malaysia

(i) Mahkamah Tinggi Kuala Lumpur, No: S3 (S8) -21-24-2001

Badrul Zaman P.S. Md Zakariah

v.

(1) The New Straits Times Press (M) Bhd

(2) Datuk Aseh Che Mat

(3) Kerajaan Malaysia

A (j) Mahkamah Tinggi Kuala Lumpur, No: S6-21-25-2001

Badrul Zaman P.S. Md Zakariah

v.

(1) Star Publication (M) Bhd

B (2) Star Papyrus Printing Sdn Bhd

(3) Datuk Aseh Che Mat

(4) Kerajaan Malaysia

C (k) Mahkamah Tinggi Kuala Lumpur, No: S3(S8)-21-135-2000

Badrul Zaman P.S. Md Zakariah

v.

(1) Shahul Hamid bin Abdul Rahim

D (2) Mohd Aris bin Chonin

(3) Ketua Pengarah Imigresen Malaysia

(4) Kerajaan Malaysia

E It was averred that the Government of Malaysia in those other civil suits as mentioned above would also apply, in due course, to the respective High Courts for security for costs bearing in mind that the plaintiff had no source of income.

F **[7]** It was further averred that in the event that this court ordered the plaintiff to pay costs to the defendants, the plaintiff may not be able to comply with the said order because the plaintiff has no source of income and for this reason the defendants' application for security for costs should be acceded to by this court.

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[8] The plaintiff affirmed an affidavit on 10 August 2005 as seen in encl. 51 and there, *inter alia*, he was advised to say that there were no provisions in the law nor in the rules to allow the defendants' application for security for costs. According to the H plaintiff, his company was rendered dormant by the *mala fide* actions taken by the defendants. He too deposed that he instituted various other civil suits in other courts against the other defendants as well as the Government of Malaysia because they continued to humiliate him and he was forced to institute those I other civil suits in order to get justice. He also deposed that he was puzzled as to why the present defendants here sought for the sum of RM50,000 as security for costs which was also the amount which the first defendant had solicited for.

[9] In his second affidavit that was affirmed on 11 August 2005 as seen in encl. 53, the plaintiff adverted to his own affidavit in encl. 51 and for the reasons as stated in encl. 51, the plaintiff prayed that the defendants' application for security for costs in encl. 50 be dismissed with costs.

[10] By way of a rebuttal, the defendants through the learned Senior Federal Counsel affirmed an affidavit in reply on 16 August 2005 as seen in encl. 54 and there, *inter alia*, it was deposed, once again, that the plaintiff's company being dormant the plaintiff had no source of income to pay the defendants' costs in the event the plaintiff's claim was dismissed by this court. It was also deposed that the plaintiff's counsel should know that the defendants' application for security for costs was grounded on O. 23 of the RHC and s. 351 of the Companies Act 1965. Further, it was deposed that the defendants were not responsible for the plaintiff's company to become dormant. It was deposed that the plaintiff as the managing director of the company was solely responsible for his own company to become dormant. It was further deposed that the defendants had no say in the running of the plaintiff's company and the defendants too did not prevent the plaintiff from carrying out a legitimate business in accordance with the law. It was also deposed that the sum of RM50,000 sought for by the defendants as security for costs was a reasonable and fair amount bearing in mind that it involved the costs of managing this case since the year 2001 inclusive of the "getting-up" and other ancillary costs that may be incurred from time to time. Finally, it was deposed that the plaintiff has failed to show to this court that he has a source of income to enable him to pay whatever costs that this court may order him to pay the defendants.

[11] In rebuttal, the plaintiff affirmed an affidavit as seen in encl. 55. There he deposed that he was advised to say by his counsel that s. 351 of the Companies Act 1965 was not applicable in this case. He too deposed that his source of income was not a relevant consideration in an application by the defendants for security for costs.

The Law

[12] Order 23 of the RHC states as follows:

A 1. Security for costs of action, etc (O. 23 r. 1)

(1) Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court:

B (a) that the plaintiff is ordinarily resident out of the jurisdiction; or

(b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that C there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so; or

(c) subject to paragraph (2), that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein; or D

(d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation,

E then, if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just.

(2) The Court shall not require a plaintiff to give security by F reason only of paragraph (1)(c) if he satisfies the Court that the failure to state his address or the mis-statement thereof was made innocently and without intention to deceive.

(3) The references in the foregoing paragraphs to a plaintiff and a defendant shall be construed as references to the person G (howsoever described on the record) who is in the position of plaintiff or defendant, as the case may be, in the proceeding in question, including a proceeding on a counterclaim.

H This order is widely used by litigants. It provides for the granting of security for the plaintiff's costs in any of the circumstances stated in r. 1(1)(a), (b), (c), and (d). It must be read with s. 351 of the Companies Act 1965 and s. 29 of the Arbitration Act 1965. For this exercise, the Arbitration Act 1965 does not apply. Rule 1(1) of O. 23 of the RHC provides that the court may order I the plaintiff to give security in any one of the four situations as set out therein bearing in mind and having regard to all the circumstances of the case. It vests the court with a wide

discretionary power to order security for the defendant's costs if the court thinks it is just to do so (*Raman Chettiar v. Palaniappa Chettiar & Anor* [1939] MLJ 165; *Coldham v. The Raub Australian Gold Mining Co Ltd* [1940] MLJ 50; and *Ho Kwai Neo (widow) & Anor v. Tan Kim Tee and Tan Kiem Tie Ltd* [1940] MLJ 84).

[13] In exercising its wide discretionary powers, the court is duty bound to have regard to all circumstances of the case. It is trite law that a defendant to any claim may apply for security for his costs of the proceedings and such an application must be supported by affidavit evidence. Here, affidavits were exchanged between the parties and the evidence unfolded supported the defendants' application for security for costs in encl. 50. When the court makes an order for security for costs, it means that security is ordered to be given and the amount of the security must be paid into court. It is the court that keeps the money in favour of the defendant. Thus, when the court makes an order for security for costs, the court will also determine the quantum of the security and will accordingly direct the manner in which and the time within which the security must be paid or given to the court. Money paid into court by a party will be regarded as security payable by that party to the opposite party. If so minded, the court is also empowered to increase the security (*Cripps v. Heritage Distribution Corpn, New England International Surety Inc v Cripps* [1999] CPLR 858).

[14] In deciding whether it is just to order security for costs, reference should be made to the case of *Sir Lindsay Parkinson & Co. Ltd. v. Triplan Ltd.* [1973] 1 QB 609, [1973] 2 All ER 273, CA, where the relevant circumstances to be taken into account before deciding whether to order security for costs were catalogued. The relevant circumstances may be stated as follows:

(a) whether it appears that the application is made in order to stifle a genuine claim;

(b) whether the order will have the effect of stifling a genuine claim even if that is not the motive for the defendant's application for security for costs;

(c) whether the application is made at a late stage; and

(d) whether the impecuniosity on the part of the plaintiff has been caused by the defendant.

According to the case of *Porzelack K G v. Porzelack (UK) Ltd* [1987] 1 All ER 1074, [1987] 1 WLR 420, CA, the court will have to take into account the likely outcome of the case before deciding whether to make an order for security for costs.

[15] The discretionary power of the court to order security for costs reign supreme. It is a discretionary power that has to be exercised judiciously (*Sir Lindsay Parkinson & Co. Ltd. v. Triplan Ltd. (supra)*; *Faridah Begum bte Abdullah v. Dato' Michael Chong* [1995] 2 CLJ 951; *Gula Perak Bhd v. Agri-Projects (M) Sdn Bhd* [1989] 1 MLJ 422; and *Kasturi Palm Products v. Palmex Industries Sdn. Bhd.* [1986] 2 MLJ 310). The court is also empowered to vary or set aside an order for security for costs if the plaintiff can show that there are material changes of circumstances (*Gordano Building Contractors Ltd v. Burgess* [1988] 1 WLR 890, CA). Of course, it is entirely at the discretion of the Court to fix the quantum of security for costs after having regard to all the circumstances of the case (*Procon (GB) Ltd v. Provincial Building Co Ltd* [1984] 2 All ER 368, [1984] 1 WLR 557, CA). Of significance is this. That security for costs may be ordered for the past as well as for the future costs that may be incurred. This cannot be doubted (*Low Chee Yan v. Loh Kong Yew* [1917] 2 FMSLR 176, *Gnanamuthu v. Muthu Chetty* [1926] 6 FMSLR 73; *Brocklebank & Co v. King's Lynn SS Co* [1878] 3 CPD 365; *Massey v. Allen* [1879] 12 Ch D 807; and *Willmott v. Freehold House Property Co* [1885] 33 WR 554, CA). Another salutary principle worth mentioning is this. That if a plaintiff who has been ordered by the court to give security for costs fails to do so, the action may be stayed until security is given, or the action may be struck off (which was what had happened here) or the action may be dismissed for want of prosecution (*Giddings v. Giddings* [1847] 10 Beav 29; *La Grange v. McAndrew* [1879] 4 QBD 210; *Re Hurter's Trade-Mark* [1887] WN 71; *Speed Up Holdings Ltd v. Gough & Co (Hardly) Ltd* [1986] FSR 330; *S v. S Muthuraman Chettiar, Etc v. E Kong Guan* [1934] MLJ 174; *Penny v. Penny* [1996] 2 All ER 329, CA; and *Selco (Singapore) Ltd v. Jean Del-porte* [1969] 2 MLJ 189).

[16] Here, from the facts garnered from the affidavits, there was reason to believe that the plaintiff, with no known source of income, will be unable to pay the defendants' costs if ordered to do so (*Farmer v. Moseley (Holdings) Ltd* [2001] All ER (D) 16 (July)).

[17] Statute wise, I will now refer to s. 351(1) of the Companies Act 1965. That section enacts as follows:

Security for costs

351(1) Where a company is plaintiff in any action or other legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

And Lord Denning MR in *Sir Lindsay Parkinson & Co. Ltd. v. Triplan Ltd. (supra)* had to decide on a similar issue based on s. 447 of the Companies Act 1948 which is almost in identical terms with our very own s. 351(1) of the Companies Act 1965 and there his Lordship aptly said at p. 285 of the reporting found in the All ER:

Turning now to the words of the statute, the important word is 'may'. That gives the judge a discretion whether to order security or not. There is no burden one way or the other. It is a discretion to be exercised in all the circumstances of the case.

Shanthy Rachagan, Janine Pascoe and Anil Joshi in their book entitled *"Principles of Company Law in Malaysia"* at p. 558 wrote the following salient passages:

Where the company brings an action as a plaintiff, the defendant may apply to the court to require the company to provide security for costs: s. 351. In exercising its jurisdiction, the court should, as far as possible, attempt to do justice to each of the litigants. The considerations, which the courts should take into account include:

- the probability of the company succeeding in its action: *Dictating Machine Centre Pty Ltd v. Combe* [1981] CLC 40, 702;
- the existence of substantial *bona fide* triable issues: *MA Productions Pty Ltd v. Austarama Television Pty Ltd* [1982] 1 ACLC 404;
- the solvency of the company: *Lin Securities (Pte) v. Noone & Co Sdn Bhd* [1989] 1 MSCLC 90, 217;
- whether such an order would unnecessarily inhibit the company from proceeding with the case;

A – where there is a reasonable prospect of the company succeeding: *Gula Perak Bhd (In Receivership) v. Agri-Projects (M) Sdn Bhd* [1989] 1 MSCLC 90, 242; and

B – whether the burden imposed by such an order would be unjust and inequitable in the circumstances; *Spiel v. Commodity Brokers Australia Pty (In Liquidation)* [1983] 8 ACLR 410.

C Where the company has gone into liquidation, it is not open to a shareholder to bring a derivative action under one of the exceptions to the rule in *Foss v. Harbottle* [1843] 2 Hare 461, 67 ER 189. The liquidator is the appropriate person to decide whether the company should take or continue legal actions: *Scarlet Pty Ltd v. City Loan & Credit Corp Ptd Ltd (No 2)* [1988] 6 ACLC 21.

D So, it boils down to this. That the court has the discretion under s. 351(1) of the Companies Act 1965 to order security for costs. All the circumstances of the case must be taken into account in exercising that discretion. And I have done just that in adjudicating encl. 50.

E **Analysis**

[18] As demonstrated, it was wrong to say as was said by the plaintiff that there were no provisions in the law governing an application by the defendants in encl. 50 for security for costs. On F the contrary, O. 23 of the RHC and s. 351 of the Companies Act 1965 would certainly be the guidelines in adjudicating encl. 50. I had dutifully applied all the principles of law as set out in this judgment in adjudicating encl. 50. It was just to order security for costs in favour of the defendants for the following reasons:

G

(a) there was reason to believe that the plaintiff will not be able to pay the defendants' costs when directed by this court in the event the plaintiff's case was dismissed with costs;

H (b) the address of the plaintiff in his writ of summons and the amended statement of claim showed the address of a dormant company with no source of income; and, consequently,

(c) the plaintiff himself has no source of income to flout around.

I **[19]** Factually speaking, there was no delay on the part of the defendants in pursuing encl. 50. It must be recalled that the first defendant had seized 350 Indian National passports when the first

defendant together with several other immigration officers entered into the plaintiff's premises on 23 February 1998. Soon thereafter an investigation was conducted and the investigation paper was submitted to the second defendant – the Public Prosecutor. The plaintiff was then charged on 28 February 1998. It took a mere five days for the Public Prosecutor to charge the plaintiff. That was certainly expeditious. There was no inordinate delay at all. When the plaintiff filed the present suit against the defendants, the original statement of claim was amended and even the original statement of defence was amended. After the pleadings were amended, the defendants discovered that the plaintiff had no source of income. This prompted the defendants to file the application for security for costs in encl. 50. Enclosure 50 itself was dated 7 June 2005. It was part and parcel of my judgment that there was no inordinate delay in filing encl. 50. The defendants had the legitimate right to file encl. 50.

[20] When the learned Magistrate acquitted and discharged the plaintiff, the Public Prosecutor as the second defendant lodged an appeal. Later, the Public Prosecutor withdrew the appeal and such withdrawal cannot be construed as malice on the part of the Public Prosecutor. As the guardian of public policy, the Public Prosecutor has the means to assess the available evidence. The Public Prosecutor has, at his disposal, certain information which is not readily accessible to anyone else. It is he and he alone who has the legal prerogative to decide on who to charge and when to withdraw that charge. Article 145(3) of the Federal Constitution gives and vests the Public Prosecutor with that power and I must give effect to it accordingly. The plaintiff should be thankful to the justice system in this country that has set him free from the charge under s. 12(1)(f) of the Passport Act 1966. In other jurisdictions, when an accused is caught in possession of 350 passports of another country, the accused will not be set free by the courts. The accused would be imprisoned and kept within the confines of the four walls of the prison. The plaintiff should consider himself lucky to be in this country where the courts are completely independent from the executive.

[21] Whether the plaintiff has a reasonably good prospects of success or whether the application for security for costs was being used oppressively by the defendants must be weighed as against the argument that the plaintiff had no genuine claim at all against the defendants. If the claim by the plaintiff was not a genuine claim, how then could it be said that the defendants had stifled

the plaintiff's claim. Including the present suit, there were, in all, twelve (12) civil suits against the Government of Malaysia that were pending. The immigration officers had arrested the plaintiff and had charged him and that became the main basis for all the plaintiff's twelve suits. Not only was the Government of Malaysia was named in his twelve suits, even the newspapers that carried the stories of the arrests of the plaintiff were sued by the plaintiff. The television station too was being sued by the plaintiff. The Public Prosecutor, the Director-General of Immigration, and other top civil servants were named as defendants. I can safely infer that the plaintiff's action cannot be construed as *bona fide* but rather it smacked of bad faith or *mala fide.*

[22] If the plaintiff were to lose his case and this court awards costs to the defendants, the defendants will find it difficult to enforce the award for costs given the fact that the address of the plaintiff that was given was not his place of residence but rather the registered office of his company. According to the case of *Aron Salomon v. A. Salomon And Company, Limited* [1897] AC 22, HL, a company is a distinct legal person from an individual. That case establishes the separate legal personality of a company. That was a case where the company was treated as a different person from Salomon. Thus, in the context of this case, any judgment entered against the plaintiff cannot be enforced against the company. Although Syarikat "Agensi Pekerjaan Dan Levi Al Zaman Sdn Bhd" belonged to the plaintiff, yet it operated independently and it can sue and be sued in its own capacity. As can be seen in exh. "KMS3" of encl. 50A, there were three directors of the company including the plaintiff and they were also the shareholders of the company. The plaintiff has sued the defendants in his own personal capacity for malicious prosecution. The company did not do so. There was no mention by the plaintiff that he was authorised to use the company's address. The company may transfer its own shares or may even sell its own property, if it has any. If this were to happen, then the chances of the defendants recovering their costs against the plaintiff, if the defendants were to win this suit, would be slim. It was part and parcel of my judgment that the plaintiff, by using the company's address as his own, had by that very act, prejudiced the defendants in that the plaintiff intended to evade the consequences of the litigation. For these varied reasons, the defendants were certainly entitled to file the application in encl. 50

for security for costs. This court must order that the plaintiff to pay security for costs in favour of the defendants and the quantum must be reasonable and it should not be illusory or oppressive (*Imperial Bank of China, India and Japan v. Bank of Hindustan, China and Japan* [1866] 1 Ch App 437; *Dominion Brewery Ltd v. Foster* [1897] 77 LT, CA; and *Bacal Contracting Ltd v. Modern Engineering (Bristol) Ltd* [1980] 2 All ER 655).

Conclusions

[23] On 22 September 2005, this court ordered the plaintiff to provide security for costs in favour of the defendants in the sum of RM50,000 and that sum was to be paid into this court within thirty (30) days from the date of this order. This court too ordered that the whole of the plaintiff's suit against the defendants be struck out with costs in the event the plaintiff failed to abide by the order of this court. Finally, this court also ordered that the costs of the application in encl. 50 be assessed and thereafter be paid to the defendants by the plaintiff. Those were the orders of this court.

[24] On 24 October 2005, the plaintiff failed to deposit the sum of RM50,000 into this court as security for costs in favour of the defendants within the thirty (30) days' time requirement calculated from 22 September 2005. Such failure resulted in the striking out of the whole of the plaintiff's suit against the defendants with costs. Those were the orders of this court.

[25] That ended the application in encl. 50 in favour of the defendants.